IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.247 OF 2004
IN
SUIT NO.3099 OF 1999

Shantidevi Sohanlal Jhuria & Anr. ...Plaintiffs

V/s.

State of Maharashtra & Ors. ...Defendants

.....

Mr.S.F.Rego i/b Bhaishankar Kanga & Girdharilal for Plaintiffs.

Mr.Rayan D'Souza for Defendants 1 & 2.

Mr.R.Y.Sirsikar for Defendants 3 to 8.

Mr.K.R.Bulchandani i/b Potdar & Co. for Defendants 9 & 10.

Mr.Rajguru with Ms.Poonam Bhosale for Defendant No.11.

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CORAM: A.M.KHANWILKAR, J.

JULY 11, 2007.

P.C.

1. By this Motion, Defendant No.9 has urged that the Court should formulate six issues as preliminary issues to be tried at the first instance. The six issues which the Defendant No.9 wants to be tried as preliminary issues are

articulated in Schedule at Page 5 of the Notice of Motion. The same reads thus:

> "1. Whether the plaintiffs prove that affidavit dated 13.4.1982 is null, void, illegal and has no legal effect and liable to be cancelled?
>
> 2. Whether the defendants prove that the plaint is liable to be rejected for the reasons alleged in para 1 of the written statement?
>
> 3. Whether the suit is barred by law of limitation as alleged in para 1 of the written statement of Defendant No.9?
>
> 4. Whether the suit is barred under the provisions of Order 2 Rule 2 of the Code of Civil Procedure?
>
> 5. Whether the suit is barred by Res-judicata or principles analogus thereto?
>
> 6. Whether the suit is bad for non-joinder or proper parties as alleged in paragraph 2(d) of Written statement of Defendant no.9?"

2. Insofar as the first issue is concerned, that will have to be considered at the trial and cannot be decided as preliminary issue as it involves mixed question of fact and law.

3. Insofar as the second issue is concerned, that refers to the stand taken in the written

statement in Para 1 of the written statement that in turn refers to the objection that the Suit is not maintainable for non-payment of requisite Court fees. It is well established position that if the Plaintiff has paid deficit Court fees, appropriate directions can be issued at the conclusion of the hearing of the Suit so as to require the Plaintiff to make over the deficit Court fee. Accordingly, that issue can be tried along with all other issues.

4. Counsel for the Defendant No.9 fairly submits that out of different grounds set up in Paragraph (1) of the written statement, he would press only for ground stated in 1(e) to be decided as preliminary issue so as to dismiss the Suit in the exercise of powers under Order VII Rule 11 of the Code of Civil Procedure - as the Suit is barred by Law of Limitation as also principle of resjudicata. In support of this submission, reliance is placed on my decision dated 21st June 2002 in Suit No.4720 of 1998 between the same parties. Emphasis was placed on observations in Paragraphs 10 and 11 to contend that even the

present Suit deserves to be dismissed on the same reasoning. However, it is not possible to accept this argument in the fact situation of the present Suit, which is for declaration that the writing and/or affidavit dated 13th April 1982 Exhibit N to the Plaint is null and void, illegal and of no legal effect and that any action taken and/or any dealing made and/or any effect given by Defendants 1 to 8 either singly or jointly in their records pursuant to such writing and/or affidavit is illegal ab initio. The averments in the present Suit will have to be considered in the context of the said relief. The point in issue involves issues of Law and of fact and not issue of Law only, so as to be tried as preliminary issue in terms of Order XIV Rule 2(2) of the Code of Civil Procedure. For the present, suffice it to observe that the request of the Defendant No.9 to frame preliminary issue in that behalf to be decided in the first instance cannot be accepted.

5. Much emphasis was placed on the third issue formulated in the Schedule referred to above that the Suit is barred by Law of Limitation.

Insofar as the issue of limitation in the present Plaint is concerned, it will be a mixed question of fact and law which therefore cannot be decided as preliminary issue.

6. For the present, Counsel for the Defendant has fairly pressed to formulate only issue of limitation as the preliminary issue and no other issue.

7. For the reasons already recorded, it is not possible to proceed to decide issue of Suit being barred by limitation as preliminary issue. That request is turned down. Accordingly, this Motion is dismissed.

8. It is made clear that observations made in this order should be understood to be limited to have considered the prayer for framing preliminary issue. The issues will have to be decided on their own merits in accordance with law.

A.M.KHANWILKAR, J.